



Washington, D.C. 20505

OLC REPORT 8817

20 JUL 1978

Pro/Liz

Honorable Peter W. Rodino, Jr., Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to express my concern about several provisions contained in H.R. 3564, a bill "to amend Chapter 5, Subchapter II of title 5, United States Code, to provide for improved administrative procedures."

The Central Intelligence Agency is neither a regulatory agency nor an agency engaging in activities directly impacting on or affecting the public generally. Further, in the foreign affairs field, "rules" would appear to include statements governing such activities as issuing passports and visas, controlling imports and exports, and regulating investment overseas. Nevertheless, the question of whether and to what extent this Agency makes rules is somewhat unsettled.

Because of the possibility that this Agency might at some time be considered to make rules within the meaning of Chapter 5 of Title V of the United States Code, I wish to offer the following comments on the amendments to 5 U.S.C. §553 proposed by H. R. 3564. The bill would narrow the exemption pertaining to a military or foreign affairs function of the United States currently codified in paragraph (a)(1) of section 553 to exempt only matters in those categories which are properly classified pursuant to Executive Order. I am concerned about the adverse impact this would have on the protections from disclosure afforded national security information.

National security information may fall into two categories: that which is classified pursuant to an Executive Order and that which is designated by the Director of Central Intelligence, pursuant to his statutory responsibility (50 U.S.C. §403(d)(3)), as information involving intelligence sources and methods. The amendment proposed by H.R. 3564 would cover, at best, only the former category of information; proposed rules relating to or involving intelligence sources and methods would be subject to the public notice and comment procedures. As a result, there would be a very great possibility of disclosure of sensitive foreign intelligence information.

In addition, the amendment proposed by H.R. 3564 would exempt only information "properly classified pursuant to ... Executive Order..." The "properly classified" standard is an invitation to litigation concerning whether the subject matter of the rule was properly classified. This litigation could have two very undesirable effects: disclosure of classified information and delay in the issuance of necessary and important rules. Both results are inimical to the public interest which the notice and hearing procedures are intended to protect.

The need for protection of information relating to the military and foreign affairs functions of the Government was recognized by Congress when it passed section 553. H.R. 3564 represents a desire by Congress to streamline that protection. The amendment proposed by the bill, however, fails to adequately protect that information which legitimately requires protection from disclosure. As a result, this Agency must oppose the amendment to 5 U.S.C. §553(a)(1) contained in H.R. 3564. I would suggest, however, that both the concerns raised in this letter and the interest of the public in participating in rule making could be adequately addressed by amending paragraph (a)(1) to read as follows:

"(1) a matter pertaining to a military or foreign affairs function of the United States that is protected from unauthorized public disclosure by Executive Order or statute..."

Subsection 2(2) of H.R. 3564 would amend 5 U.S.C. §553(a)(2) by deleting the exemption for matters relating to public property, loans, grants, benefits, or contracts. In the contracting area, this amendment would present the same problems discussed above. This Agency would have no objection to the amendment, however, if paragraph (a)(1) were amended as recommended above.

I recognize that subsection (2)(3) of H.R. 3564 would amend paragraph (b)(B) of section 553 to make clear that the "public interest" includes the "interest of national defense or foreign policy in a matter pertaining to a military or foreign affairs function..." The amendment provides, however, that an agency must "for good cause" find notice procedures contrary to the public interest. Also, any determination as to the "public interest" necessarily requires balancing of factors. Both the "good cause" requirement and the balancing necessary to determine the public interest would be open invitations to litigation and its attendant potential for disclosure of

sensitive information. Because of the possibilities of disclosure, proposed paragraph (b)(B) would not adequately protect that information not covered by the amendment to 5 U.S.C. §553(a)(1) proposed by H.R. 3564. Again, the amendment offered above would adequately protect information which must be protected while insuring increased public participation in rule making in other areas.

The Office of Management and Budget has advised there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

SIGNED

Frank C. Carlucci

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